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In The

SUPREME COURT OF THE UNITED STATES

October Term 1966

ARTHUR WILCOX, LESLIE GRIER, GEORGE PORTER, ABE SMITH, RUSSELL WATERS and OTIS DRUMMOND,
Petitioners,

v.

TRANSAMERICAN FREIGHT LINES, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SIXTH CIRCUIT

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In The

Supreme Court of the United States

October Term 1966

No. ———

ARTHUR WILCOX, LESLIE GRIER, GEORGE PORTER, ABE SMITH, RUSSELL WATERS and OTIS DRUMMOND,
Petitioners,

v.

TRANSAMERICAN FREIGHT LINES, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SIXTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals of the Sixth Circuit rendered in the above entitled cause.

OPINIONS BELOW

The opinion of the District Court, Southern District of Ohio, Western Division (App. 1a) has not been reported. The opinion of the United States Court of Appeals, Sixth Circuit (App. 7a) is reported in 371 F (2d) 403.

GROUNDS ON WHICH JURISDICTION INVOKED

(1) The date of the judgment sought to be reviewed and time of its entry was January 18, 1967.

(2) There has been no rehearing.

(3) The statutory provision conferring jurisdiction on this court to review the judgment is 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

May a Court, on the facts presented, grant a motion for summary judgment thereby depriving petitioners of a jury trial; specifically, may a court hold, as a matter of law, that Respondent, Transamerican Freight Lines, (a certificated common carrier of goods engaged in interstate commerce, the exclusive lessee of the vehicle involved in the accident, and subject to the leasing requirements of the Interstate Commerce Commission) is not responsible to Petitioners for injuries received as a result of the negligence of Respondent's employee?

The subsidiary questions thereto are:

(1) Do the Regulations of the Interstate Commerce Commission impose such liability on Respondent, lessee of the vehicle?

(2) Do important considerations of public policy dictate the imposition of such liability on Respondent?

(3) Do the decisions of the Ohio courts and common law rules of master and servant, when properly interpreted and applied, impose such liability (or, in the alternative, require a jury hearing)?

CONSTITUTIONAL PROVISIONS AND FEDERAL REGULATIONS INVOLVED

Constitution of the United States

AMENDMENT VII – Civil Trials

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Regulations Interstate Commerce Commission, 49 CFR, Chapter 1, Sub Ch. B, Part 207 set forth in the appendix: (App. 10a).

STATEMENT OF THE CASE

Actions in excess of $10,000.00 each, arising out of personal injuries to all six Petitioners, were filed in the Common Pleas Court of Hamilton County, Ohio, which were removed by Respondent to the Federal Court on the grounds of diversity of citizenship.

On April 20, 1961 all six Petitioners suffered serious injuries as a result of a collision between the car in which they were riding and a tractor driven by Harry Culyer, who was an employee of respondent, Transamerican Freight Lines, a certificated common carrier of goods in interstate commerce. The tractor, owned by Culyer, was under exclusive lease to Respondent. At the time of the accident, the tractor bore Respondent's name in bold lettering, Respondent's I.C.C. certificate number, and all other material identifying it as Respondent's equipment and under its operation. Respondent admits these facts.

Because all six cases involved identical facts and issues (aside from the injuries) they have been consolidated for the purposes of pre-trial, for Respondent's motion for summary judgment (on the grounds that Respondent

would not be legally responsible for the negligence of its employee, Culyer), for appeal, and in this proceeding. The District Court granted Respondent's motion, rendering final judgment for Respondent in all six cases, which was affirmed on appeal.

The facts upon which the Court acted are as follows:

The lease ("Agreement") from Culyer to Respondent (a copy thereof being part of the record) conformed to I.C.C. Regulations except that it could be cancelled by either party upon five day notice. (This is not germane to the issues in that there was no cancellation). The lease provided in substance that: (1) the tractor "shall be under *complete control*" of *Transamerican* (Respondent) and "subject to such use as it may desire to make of it"; (2) Culyer *"shall not in any way control the use or operation"* of the tractor; (3) nothing in the lease shall be "construed in any wise to limit the liability" of Respondent "to the public in connection with the use of the tractor"; (4) upon termination of the agreement, Culyer would remove all plates, signs, etc. of Respondent; (5) Culyer would, at all times, keep the equipment in good mechanical condition, order and repair.

A deposition of Harry Culyer reveals that:

(1) At the time of the accident, Culyer was employed exclusively by Respondent; he was not permitted to drive for any one else; he was wearing a uniform and chauffeur's cap with "Transamerican" on it.

(2) The tractor was "exclusively bound" to Respondent, never being used to pull any trailers except Transamerican's or by Culyer for any personal matters. Culyer was the owner-operator who always served as driver of the tractor.

(3) Transamerican's name and permit numbers were painted on the vehicle. (Pictures of the tractor are included in the record).

(4) When not in use on Transamerican's business, the tractor was always parked by Culyer (with Respondent's knowledge and consent) at Respondent's Cincinnati terminal. Culyer used his own automobile to drive to and from this terminal (never using the tractor).

(5) At every terminal the tractor was examined by Respondent and if it failed to pass inspection, it was not used until properly repaired.

(6) Culyer was subject to call at any time and at any hour and obliged to take any load when called by Respondent.

(7) On Thursday, April 19, 1961 Culyer, who had been on the road for some three weeks on Respondent's business, delivered a load (apparently originating in South Bend, Indiana) to Respondent's Dayton terminal.

(8) After waiting some hours to ascertain if Respondent had any further loads, he was eventually told by dispatcher to go home for the week-end.

(a) There were no facilities at the Dayton terminal for Culyer to stay there.

(b) The Dayton terminal was "out in the woods", with no bus service so that the tractor was the only means available to Culyer to find lodgings.

(c) Because Culyer had been on the road for three weeks, this was a week end, and the Cincinnati terminal was only about 50 miles from Dayton, Culyer, with Respondent's knowledge and permission, proceeded to drive the tractor toward the Cincinnati terminal. When the accident occurred he was on the regular and most direct route from Dayton to the Cincinnati terminal.

(d) Culyer had a dual purpose in mind: to drive the tractor to the Cincinnati terminal where he could more properly and economically "put normal

maintenance on the truck" ("to take care of the truck which [he] promised Transamerican he would do") and, after parking the tractor on Respondent's lot, to drive home in his own car to spend the week end with his family. Respondent knew that drivers like Culyer went to their home terminals for repair service and upkeep of vehicles.

(e) On the night in question and at the time of the accident, Culyer was subject to call by Respondent; he would have been required to take any load if called by Respondent; Respondent had Culyer's phone number so that the dispatcher would know where to call him.

(9) Culyer made an immediate report of the accident to Respondent and to Respondent's insurer; Respondent furnished Culyer with forms to report to the State of Ohio and assisted him in preparing the report.. (A copy of this accident report is also included in the record.)

REASONS FOR GRANTING WRIT

1. The Court of Appeals' decision (holding that the I.C.C. Regulations do not impose any duty on lessee of owner-operated vehicles differing from the ordinary master-servant rules) is in direct conflict with the decision of the Court of Appeals Third Circuit namely, *Mellon National Bank & Trust Co.* v. *Sophie Lines, Inc.*, 289 F (2) 473 (CCA 3rd, 1961) which held that under these Regulations, the lessee is responsible for the operation of the vehicle so long as and whenever the vehicle bears lessee's decals.

2. The decision is directly in conflict with the Regulations of the Interstate Commerce Commission.

3. The Court of Appeals has decided this important question of federal law (the effect of the leasing provisions

of the Interstate Commerce Act) which question has not been, but should be settled by this court.

(a) Considering the ever increasing volume of vehicular traffic and danger of injury to the public, involving serious economic loss to the injured persons, the question of the responsibility to the public for injuries negligently caused by franchised carriers is a matter of great public concern. Therefore, this Court should decide and put to rest the question of the effect of the Regulations so that, if necessary, corrective amendments may be made or so that these Regulations are uniformly applied and interpreted wherever suit may be brought. The rights of the public under the I.C.C. Regulations should not be left to speculation and chance (in which District the injured person sues).

A. The I.C.C. Regulations Impose Liability on Respondent.

The lower courts' holding distorts the apparently obvious definitions, meaning and interpretation of the words used in the Regulations.

(1) The Regulations expressly required Respondent to have had *exclusive* possession, control, and use of the leased quipment at all times. (§ 207.4 (a) (4)) If, at the time of the accident, Culyer could be said legally to have "possession", it follows ineluctably that Respondent's possession could not possibly be "exclusive". If Culyer had "control", then Respondent's control was non-exclusive. If Culyer had the "use" of the equipment, such could not possibly be consistent with Respondent's "exclusive use". If the Regulations are to be applied and the language thereof

given its universally accepted meaning, it is impossible to sanction or to give any legal effect to any attempted surrender or transfer of possession (except, as provided in the Regulations, to another authorized carrier) during the term of the lease.

(2) The Regulations specifically required Respondent to "assume *complete* responsibility" for the control and use of the vehicle. (§ 207.4 (a) (4)) How can these words be interpreted to enable Respondent to disclaim such "complete" responsibility. Any break in the chain of "responsibility" would necessarily make it "incomplete" — a direct contradiction of what the Regulations say.

(3) The Regulations (§ 207.4 (a) (4) (i)) permit of *only two exceptions* to such complete and exclusive possession, control, use, and responsibility: (a) by sublease to another *authorized carrier* and (b) *carriers* of *household goods* are required to have such *exclusive use "only when the equipment is operated for the authorized carrier"*. (207.4 (a) (4) (ii))

Hence, based on any logical approach and following the maxim "expressio unius, exclusio alterius", the only reasonable conclusion is that a surrender or transfer of possession, control or use is permissible in these two cases only and forbidden in all other cases. The fact that the exception permits carriers of household goods to limit their responsibility to the times "when the equipment is operated for the authorized carrier" carries with it a clear implication that all other carriers, such as Respondent, must assume complete responsibility for the use of the equipment at all times, irrespective of the purpose of the use or by whom it is used.

(4) Respondent was required to identify its equipment and a copy of the lease (or, in lieu thereof, a statement) must be carried on the vehicle at all times. (§ 207.4 (a) (7) § 207.4 (d)) The statement must certify that *the equipment is being operated by the carrier*. (§ 207.4 (d) (2)) What purpose is to be served by such requirements if the carriers may dispute the truth of such certification. The vehicle carries the flag of the lessee, the lessee *certifies* to the world that whenever the equipment is being used with its consent, the carrier is the one operating the equipment. Is the certification to be a meaningless gesture of no legal effect?

(5) Before possession, control, use, or complete responsibility is relinquished by the lessee-carrier, it must remove all identification showing it as the operating carrier (§ 207.4 (d)) and get a receipt (§ 207.4 (b)). The lower courts ignored these requirements and held that a failure to comply therewith entails no legal consequences.

A review of the history of the leasing Regulation may illustrate even more forcefully the basic fallacies of the lower courts' decision.

Prior to 1952, trip leasing of these owner-operated vehicles was permissible. The carrier was required to have possession *only during the period the equipment was operated in its service.*

This gave rise to such decisions as *Costello* v. *Smith,* 179 F (2d) 715 (1950 CCA 2) (involving the "empty" return trip) which was followed in Ohio in the case of *Simon* v. *McCullough,* 155 Ohio St. 104, 98 NE 19 (1951). Those decisions (favoring the carrier) were predicated upon the

absence of any clear regulatory action by the Commission which would impose liability on the carrier *"after the lease was ended"*.

Even in this pre-1952 era, there existed a "judicial antipathy toward the *Costello* decision" (a judicial cognizance of the basic unfairness in allowing the trucking company to escape liability and thereby deprive the injured person of any adequate remedy). 43 *Iowa L.R.* 545. A number of courts, despite the absence of any clear legislative expression, held the carrier liable on the return voyage despite the one way lease.

Hodges v. *Johnson*, 52 F. Supp. 488 (DC WVa 1943)

Leota v. *Plesinger*, 8 NY (2d) 449, 171 NE (2d) 454 (1960)

The I.C.C. took cognizance of the problems or "evils" created by the trip leasing among which were the following:

(1) The owner-operators, after completion of the trip, were on their own and the carrier assumed no responsibility for returning them to their homes.

(2) The operator would come into and out of regulated transportation depending on the desires of the authorized carrier.

(3) The owner-operator, being an independent contractor, was not under full control of the carrier.

(4) *Since some* of the *owner-operators* (as in our case) *did not carry public liability insurance, protection for the public might be entirely lacking.*

See *American Trucking Association* v. *United States*, 101 F. Supp. 710, 726 (Alabama 1951)

Note 32

Eastern Motor Express v. *United States*, 103 F. Supp. 694, 698 (Indiana 1952)

To eliminate these "evils" the Commission adopted two corrective amendments to the Regulations.

(1) In 1951 (effective February 1, 1952) 30 day leases were required for these owner-operated vehicles.

(2) In 1956 (effective 1957) Section 207.4 (d) was amended by deleting the words "when such equipment is operated by or through the carrier" thus requiring the carrier's identification to be on the equipment at all times.

Despite these amendments, the District Court and the Court of Appeals have sanctioned the condemned practice of "leaving the owner-operator on his own with the carrier's assuming no responsibility for returning him to his home." The Court countenances Respondent's leaving Culyer stranded "out in the woods" in Dayton with no means of transportation (other than the tractor) and no facilities. The protection for the public, which was the Commission's concern, is entirely disregarded. The old days of "trip-leasing", with all its attendant evils, have, in effect, been restored. The lower courts would impose liability on the carrier only when the equipment is used in the carrier's business despite the Commission's deletion of such limitation from the Regulations. The logical result of the Court's ruling would be transportation's "coming into or out of regulated transportation at the desires of the carrier." If Respondent may, with impunity, let Culyer use the vehicle to go home, why logically, could not Respondent have let him use it to drive for some one else or have permitted use of the vehicle by any unauthorized carrier? The entire purpose of the Regulations would be circumvented.

Since 1952, with one or two minor exceptions (and then under factual situations quite at variance with the one herein involved), the Courts have held the lessee of such owner-operated vehicles liable whenever the vehicle was being used with the lessee's consent.

Mellon Nat'l. Bank & Trust Co., et al v. *Sophie Lines, Inc., et al,* 289 F (2d) 473 (CCA 3 1961)

Marriott et al v. *Nat'l. Mutual Casualty Co. et al,* 195 F (2d) 462 (CCA 10 1952)

Felbrandt v. *Able,* 79 NJS 308, 194 (2d) 491 (1963)

Duke v. *Thomas,* 343 SW (2d) 656 (MO 1961)

(To these cases can be added those, heretofore cited, which held the carrier liable prior to the Amendments).

Hence, the Sixth Circuit joins with the small minority. In doing so, the Court, by judicial fiat, superimposed on the Regulations its own concept of common law rules thereby either distorting or ignoring the express words used in the Regulations. The Court adopted a back door approach: would an owner be liable; if not, then neither would a lessee of such owner-operated vehicle. Aside from the Court's erroneous conclusion as to the owner's liability, this is an application of the Regulations based on visceral reactions rather than on a study and proper interpretation. The Regulations should be read and interpreted as to the responsibilities imposed on the *"lessee"* of the owner operated vehicle to which they specifically apply. The Commission has found a need to regulate as to the lessee. Whatever may be an owner's responsibility is entirely extraneous. Interpret and apply the Regulations according to the reasonable construction of the language used and to the situation to which they expressly apply, namely, the *lessee* of the owner-operated vehicle. Had the Commis-

sion intended to place such lessee in exactly the same category as the owner, it could easily have said so. Is it not significant that the reference to "owner" appears among the exceptions: the lessee may be considered as "owner" to relieve itself of this complete responsibility by leasing to another authorized carrier? Should it not, then be logically inferred that in all other cases the lessee of an owner-operated vehicle does not have the privilege of an "owner" to transfer possession, control, and responsibility.

The Court considered this case as if there were a "bailment" but failed to note that a bailment necessarily entails a delivery which excludes possession of the owner and gives the bailee sole custody and control over the article bailed.

7 *O. Jur.* (2d) *Bailments* § 3 p. 92

The Regulations proscribe such "excluding" of lessee's possession (it is the lessee and he alone who must have exclusive possession); they forbid lessee from giving such sole custody and control to another (the lessee must have *exclusive* custody and control). Hence, there can be no bailment (except to an authorized carrier) and the legal concepts based thereon are irrelevant. Because the driver, Culyer, could not possibly be a "bailee" under the Regulations, perforce he must have been a servant for whose negligence Respondent would be responsible.

Why should a Court find it repugnant or even unlikely that the Commission might have intended (as it certainly appears to be true) to impose a greater responsibility on a lessee? There is little likelihood that companies will permit their drivers to use company owned vehicles except on company business. Further, carriers will not leave their regular drivers stranded. They will supply them with

loads to get to their home terminals or provide facilities for lodging. The danger of use by financially irresponsible drivers exists in these owner-operator lease cases calling for special regulation.

The fact that the Commission does not require the lessor (owner-operator) to have insurance, is another facet which leads to the obvious conclusion that the Commission intended to fasten responsibility at all times on the carrier. We refer again to *Eastern Motor Express* v. *United States, supra.* Certainly, we must logically believe that a carrier's vehicles (leased or otherwise) should not be permitted to be operated on the highways by financially irresponsible persons who cause injury for which the injured person has merely an illusory remedy.

B. Public Policy.

The carrier has been afforded a special privilege from the government to lease a vehicle for operation under its franchise on the highways, subject to compliance with certain rules. The carrier should, then, owe to the public a correlative duty to comply with these rules and not to use such vehicles or to authorize use thereof unless it assumes full responsibility therefor. It seems contrary to sound public policy to permit the financially responsible (and insured) carrier to use the highways under a special franchise and yet be enabled to escape liability for such use on some legal technicality.

The "public policy" arguments may be set forth by quotations from several Ohio cases:

> "Any business organization which permits a commercial conveyance to ply the public highways prominently proclaiming its name owes a duty to the public to stand by that voluntary self-advertising proclamation."
>
> *McDougall* v. *Cartage Co.*, 169 Ohio St. 522, 527 160 N.E. (2d) 266, 270 (1959)

"The duties, purposes and obligations of motor freight companies . . . are quasi-public in nature and the operation of trucks and trailers on the public highways greatly increases the hazards of driving thereon by others entitled to use them."

Stickel v. *Erie Motor Transport Inc.*, 54 Ohio App. 74, 79, 6 NE (2d) 15, 17 (1966)

"Principles of law applicable thereto should expand to cover newly created and changing conditions and necessities. It would seem that public policy requires it and the general public affected by the increased hazards has a right to expect it . . ."

Stickel v. *Erie Motor Transport, Inc.*, 54 Ohio App. 74, 79, 6 NE (2d) 15, 17 (1936)

C. Misapplication of Ohio Law Pertaining to Agency.

In addition, the Courts below misapplied Ohio law. Whether Respondent's liability should be tested as if it were the owner of the vehicle and on common law principles, Respondent would still be liable (or, at least, the question of its responsibility must be submitted to the jury for its decision).

The Court failed to apply the doctrine of presumptions which automatically requires a jury trial wherein the burden is on the carrier to convince the jury (not the court) of its non-liability. The Court treated the case as if the driver were on some frolic of his own entirely divorced from the employer's business.

The Court's decision is directly contrary to the Ohio Supreme Court's rulings. The Ohio Supreme Court has declared, unequivocally, that the mere fact that the vehicle bears the distinctive marking and I.C.C. permits of a

company suffices to make out a prima facie case against the company.

McDougall v. *Cartage Co.*, 169 Ohio St. 522, 160 NE (2d) 266 (1959)

The Ohio Court cites with approval the case of *Fullerton* v. *Motor Express*, 375 Pa 173, 175, 100 A (2d) 73, 74 (1953) wherein it was stated:

> "The presence of a name on a commercial vehicle raises a rebuttable presumption that . . . the driver of the vehicle is a servant of defendant acting within the scope of his employment . . . *This presumption is self-sufficient to take the case to the jury even though the defendant produces uncontradicted evidence that the driver was not its employee.*" (Emphasis supplied)

Further the Court, in applying the master-servant rule, has brushed aside other rules enunciated by the Ohio Courts. (We might even add that it disregarded some of its prior decisions). The Court lost sight of the fact that it is the "*right* to control" which is decisive, not the mere exercise thereof.

Ross v. *Burgan*, 163 Ohio St. 211, 126 NE (2d) 592 (1955)

In *Allstate Ins. Co.* v. *Combs*, 2 Ohio App. (2d) 17, 206 NE (2d) 36, 37 (1964) the Court said:

> "The opinion of the Court [Ross v. Burgan] makes it clear that the *right to control* is determinative. Hence the fact that the owner did not direct or control the driver does not affect the agency relationship . . . .
> "Counsel . . . argues that there must be some business or commercial element involved . . . No where in the definitions of agency do we find such requirement."

See also *American Transit Lines* v. *Smith*, 246 F (2d) 86 (CCA 6 1957).

Aside from the Regulations, the lease definitely gives the right to control at all times to Respondent. The lease specifically recited that *Culyer "shall not* in any way *control* the *use or operation* of the tractor."

Hence, the Court erred in applying the Ohio common law principles of master and servant.

Further, the Court disregards the "return home" phase. The Respondent put this vehicle on the road. Certainly the parties contemplated that Culyer (the owner-operator of the vehicle) would return to Cincinnati and not be on the road interminably. Who, but Respondent, was responsible for the tractor's being on the highway at the time of the accident? By reason of Respondent's business Culyer was "stranded" in Dayton with no means of transportation or lodging except by use of the tractor. The use by Culyer of the tractor at the time of the accident directly arose out of Respondent's business and was incidental thereto. The trip from Dayton was a part and parcel of and directly related to the interstate carriage in which Culyer was engaged for Respondent. Culyer's driving the vehicle to Cincinnati to his home terminal was a use obvious to every one, to be contemplated and expected by the carrier as an almost certain denouement of his work. It was a mere "return trip" culminating a three week voyage on the road for Respondent. In this connection see:

Amstutz v. *Prudential*, 136 Ohio St. 404, 26 NE (2d) 206 (1940)

This is accentuated by the fact that Culyer intended to service the vehicle. This was for Respondent's benefit as well as Culyer's. In doing things incidental to repairing

or servicing a vehicle, the carrier is "as much engaged in the business of common carriage as when actually on specified routes."

Mitchell v. *Great Eastern Stages, Inc.*, 140 Ohio St. 137, 42 NE (2d) 771 (1942)

Where a servant combines his own business with that of the master, any benefit to the master, no matter how slight or indirect, will suffice to hold the master responsible.

Restatement, Agency § 236
United States v. *Webye*, 191 F (2d) 181 (CCA 9 1951)
Kaplan Trucking Co. v. *Lavine*, 253 F (2d) 254, 262 (CCA 6 1958)

The lower Court went off on a tangent by saying this was Culyer's responsibility as lessor (not as the operator) and hence, in this respect, he operated as independent contractor. This reasoning is entirely fallacious in that the carrier, as well as Culyer benefited; Culyer could never take or use the vehicle as an independent contractor. Based on the Regulations, and lease as well, the vehicle and use thereof remained in Respondent's possession and under its complete control so that, in performing an act beneficial to lessee as well as to himself, Culyer was operating the vehicle as a servant in furtherance of his master's business.

CONCLUSION

The lower courts ignored the Regulations of the Interstate Commerce Commission and expressly and anachronistically decided the case on "Hornbook Law" (See opinion District Court). Although the equities seemingly are

overwhelming in favor of Petitioners, the lower courts conceived of certain common-law master-servant rules as sacrosanct and controlling. It seemingly was inconceivable to them that any legislative body might, in the public interest, change the rules of the game. They failed to recall that master-servant law is not a static concept but had its origin in public policy and develops and expands in accordance with the equities and public welfare. They even failed to apply the law as developed by the Ohio courts.

All that the petitioners request is their constitutional right to a jury trial. The liability of carriers, operating under a public franchise, is a matter of great concern not only to these Petitioners but to the public at large to be assured that if the use of the highways by a franchised carrier's vehicles entails injury to a member of the public, he should, at the very least, be entitled to know that he has an action against some one financially responsible.

For the reasons heretofore set forth, the issues herein do involve serious, substantial, and important questions of Federal Law which should be decided by this court.

Respectfully submitted,

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APPENDIX A

In The

UNITED STATES DISTRICT COURT

for the Southern District of Ohio, Western Division

Civil Action No. 5314

ARTHUR WILCOX

v.

TRANSAMERICAN FREIGHT LINES, INC. and HARRY CULYER

Civil Action No. 5315

LESLIE GRIER

v.

TRANSAMERICAN FREIGHT LINES, INC. and HARRY CULYER

Civil Action No. 5319

GEORGE PORTER

v.

TRANSAMERICAN FREIGHT LINES, INC. and HARRY CULYER

Civil Action No. 5320

ABE SMITH

v.

TRANSAMERICAN FREIGHT LINES, INC. and HARRY CULYER

Civil Action No. 5326

RUSSELL WATERS

v.

TRANSAMERICAN FREIGHT LINES, INC. and HARRY CULYER

Civil Action No. 5327

OTIS DRUMMON

v.

TRANSAMERICAN FREIGHT LINES, INC. and HARRY CULYER

MEMORANDUM OPINION

(Filed October 6, 1965.)

These are actions for personal injuries arising out of a common accident. Plaintiffs are the driver and five passengers of an automobile which was involved in a collision with a tractor owned and operated by defendant Culyer under a lease agreement with defendant Transamerican Freight Lines, Inc. (hereinafter called "Transamerican").

The causes are presently before the Court on defendant Transamerican's motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure. Since identical questions of law and fact are presented, they are here consolidated for consideration. Memoranda in opposition to the motion have been filed only in cases No. 5326 and No. 5327, but at the time of oral argument counsel stipulated that these memoranda were also to be considered in the companion cases. It is here determined that there are no genuine issues as to any material facts and the

causes are in proper posture for summary judgment disposition.

Culyer is the owner-operator-lessor of the tractor involved under a lease agreement with Transamerican. The lease complied with the regulations of the Interstate Commerce Commission, 49 C.F.R. § 207.4, in providing that the tractor "shall be under the complete control of [Transamerican] and subject to such use as it may desire to make of it"; that Culyer "shall not in any way control the use or operation" of the tractor; and, that the lease was not to be construed as limiting the liability of Transamerican to the public in connection with the use of the tractor.

The collision from which this action arose occurred around 1:30 a.m. on April 20, 1961, on Interstate Route 75 in Warren County, Ohio. The facts thereof are immaterial for present purposes. On the day prior to the accident, Culyer had delivered a load of freight from Transamerican's South Bend, Indiana, terminal to its Dayton, Ohio, terminal. On that day at 5:46 p.m., Culyer had signed out on the dispatcher's sign-out sheet in the Dayton terminal, indicating that he was returning to his home in Covington, Kentucky, for the weekend. There is a conflict as to how he spent the subsequent 5 or 6 hours, but it appears that on his own initiative he remained in or around the terminal hoping to be assigned another load. When the prospect appeared dim for such assignment he left in his tractor and the accident ensued. Culyer's tractor bore the name and I.C.C. permits of Transamerican.

The affidavit of Robert E. Taylor, Transamerican's Dayton dispatcher, establishes that Culyer was not told to go home by Transamerican and was not proceeding under any directive from it. It also indicates that Transamerican was unaware that Culyer was going to drive home in his tractor.

Culyer's deposition discloses that his purpose in driving to Covington was to visit his home from which he had been absent for 3 weeks and to conduct routine maintenance work on his tractor, as required by the lease. His daily log sheet indicates that he was off duty at the time of the accident. His initial destination was the Transamerican terminal in Cincinnati, Ohio, where drivers were permitted to park their private automobiles as a convenience.

His deposition also discloses that he was paid on a mileage basis only when dispatched by Transamerican, although a separate rental was paid for the tractor. Social security and withholding taxes were deducted from his compensation by Transamerican.

It is Transamerican's contention that Culyer was at the time of the accident outside the scope of his employment and the present motion is directed at establishing this as a matter of law. Plaintiffs contend that Transamerican cannot disclaim possession and control of the vehicle in light of the lease provisions and the I.C.C. regulations governing leased vehicles, and that the present motion may be determined solely on these bases.

By virtue of the I.C.C. regulations and the lease provisions noted above under which nonowned equipment may be operated under a carrier franchise, it seems clear that because Culyer's operation of the tractor was subject to the exclusive control of Transamerican, the relationship of master and servant existed between them. The effect of the regulations and the lease is to make the owner-operator-lessor an employee of the lessee. (*Kaplan Trucking Co.* v. *Lavine,* 253 F.2d 254 (6th Cir. 1958); *Marriott* v. *National Mut. Cas. Co.,* 195 F.2d 462 (10th Cir. 1952); *Gackstetter* v. *Dart Transit Co.,* 269 Minn. 146, 130 N.W. 2d 326 (1964)).

The plaintiffs' position herein amounts to an assertion that, as a result of the lease and the I.C.C. regulations, Transamerican is absolutely liable for *any* negligent operation of the tractor by Culyer during the term of the lease. It has not been shown here that the regulations supersede the common law doctrine of respondent superior. In fact, the cases cited by counsel in support of and in opposition to the present motion unequivocally establish that liability has not been imposed on an absolute basis but rather has been based on whether at the time of the accident the owner-operator-lessor was in the scope of his employment for his carrier's business. (E.g., *Kaplan Trucking Co.* v. *Lavine, (supra)*; *Marriott* v. *National Mut. Cas. Co., (supra)*; *Mellon Nat. Bank and Trust Co.* v. *Sophie Lines, Inc.*, 289 F.2d 473 (3rd Cir. 1961); *Gackstetter* v. *Dart Transit Co., (supra)*; *Felbrant* v. *Able*, 80 N.J. Super., 587, 194 A.2d 491 (1963)).

It is hornbook law that a master is vicariously liable for torts of his servant committed within the course and scope of his employment. The servant must be acting primarily for his master in the furtherance of the master's business before liability attaches, and if the tort occurs while the servant is in pursuit of an activity personal to himself, the master is not liable. (*The White Oak Coal Co.* v. *Rivoux*, 88 Ohio St. 18, 102 N.E. 302 (1913)).

It is here determined as a matter of law that Culyer was pursuing a personal activity at the time of the collision and was thus outside the scope of his employment. He had signed out in Dayton for his home. He had recorded in his daily log sheet that he was off duty. He was not being paid for his trip home and was proceeding without having been dispatched by Transamerican. The use of his tractor was necessitated by an absence of other means of transportation and was undertaken without the knowledge or direction

of Transamerican. His mission was to visit his home and perform routine maintenance on his tractor.

While it is arguable that maintenance of the tractor conferred a direct benefit upon Transamerican and was in furtherance of its business, such maintenance was more for Culyer's personal benefit. He was to keep his tractor operational and thereby be able to accept loads as they became available, but the record establishes that were he unable to do so, Transamerican had a number of other employees on call.

It follows that defendant Transamerican's motion for summary judgment is well taken and an entry in accordance with the foregoing may be presented.

/s/ JOHN W. PECK
District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 17078

ARTHUR WILCOX, LESLIE GRIER, GEORGE PORTER, ABE SMITH, RUSSELL WATERS and OTIS DRUMMOND,

Plaintiffs-Appellants,

v.

TRANSAMERICAN FREIGHT LINES, INC. and HARRY CULYER,

Defendants-Appellees.

Appeal from United States District Court for the Southern District of Ohio, Western Division

OPINION

(Decided January 18, 1967.)

Before WEICK, Chief Judge, PHILLIPS and CELEBREZZE, Circuit Judges.

PER CURIAM. This appeal is from an order of the District Court granting Transamerican's motion for summary judgment and dismissing the complaint. There was no genuine issue over the facts. The sole question was whether Transamerican, an interstate common carrier by truck, was liable for negligence of the owner-driver of a tractor which it leased from him and which collided with an automobile, injuring the plaintiffs.

The owner-driver of the tractor was in the employ of Transamerican, but its defense was that at the time of the accident he was off duty and was not engaged in its business.

Plaintiffs contended that absolute liability for any negligence of the owner-driver existed because of Regulations of the Interstate Commerce Commission which provided in substance that the tractor should be under the complete control of Transamerican during the term of the lease.

In our opinion, the I.C.C. Regulations do not impose a liability on a carrier using leased equipment greater than that when operating its own equipment. Under Ohio law, liability of an owner of a motor vehicle for the acts of his employee, is governed by the principle of respondeat superior. *White Oak Coal Co.* v. *Rivoux,* 88 Ohio St. 18 (1913). If one of the owner's vehicles was being operated by an employee with permission but on a mission of employee's own, the owner cannot be held liable. The same rule applies to leased equipment. *Thornberry* v. *Oyler,* 164 Ohio St. 395 (1955); *Kaplan Trucking Co.* v. *Lavine,* 253 F.2d 254 (1958).

The owner-driver of the tractor on the day in question had completed a trip for Transamerican with his tractor attached to a trailer, and he had checked out on its official "sign out sheet" at its Dayton, Ohio terminal. His log showed he was "off duty". He waited at Transamerican's Dayton terminal, hoping to get another assignment, but when one was not forthcoming he decided to go to his home in Covington, Kentucky. He drove his tractor (the trailer having been detached), intending to leave it at Transamerican's Cincinnati terminal where he had parked his own automobile with permission. The accident occurred shortly after he left the Dayton terminal.

Transamerican did not know that he had taken his tractor to drive home, but he had implied authority to

do so. He had intended to do some work on his tractor at the Cincinnati terminal, which he was required to do under the provisions of his lease in order to perform his obligation to maintain the tractor in proper operating condition. This was work for his own benefit which he could do himself or have performed by others. Normally as soon as he obtained his next work assignment he would have been required to report for duty to the Dayton terminal, from which place he would start on his next trip.

In driving his tractor on the way home after completion of his work and while off duty, he was not engaged in his employer's business, nor was he doing anything for the benefit of his employer.

Viewing the evidence in the light most favorable to the plaintiffs, the District Judge would have been required to direct a verdict in favor of Transamerican, if the case had gone to trial before a jury. Under these circumstances, the District Judge did not err in granting summary judgment in favor of Transamerican. He gave careful consideration to all of the contentions of the plaintiffs in a well reasoned memorandum opinion and supported his decision with ample authority.

Affirmed.

APPENDIX C

LEASE AND INTERCHANGE OF VEHICLES BY MOTOR CARRIERS

Part 207—Lease And Interchange Of Vehicles

Sec.

207.1 Applicability.
207.2 Definitions.
207.3 Exemptions
207.4 Augmenting equipment.
207.5 Interchange of equipment.
207.6 Rental of equipment to private carriers and shippers.
207.10 Perishable products manufactured from perishable property.

Authority: §§ 207.1 to 207.6, inclusive, issued under 49 Stat. 546, as amended; 49 U. S. C. 304.

Source: §§ 207.1 to 207.6, inclusive, contained in Order, Ex Parte No. MC-43, issued May 8, 1951, effective September 1, 1953*, 16 F. R. 4804, 18 F. R. 3023; reissued November 23, 1956, effective February 1, 1957, 21 F. R. 9653 (except Section 207.4 (a) (3), effective Apr. 2, 1957, Order, ICC, Feb. 1, 1957, 22 F. R. 760).

§ 207.1 **Applicability.** The rules and regulations in this part apply to the augmenting of equipment by common and contract carriers of property by motor vehicle in interstate or foreign commerce subject to Part II of the Interstate Commerce Act, 49 U.S.C. 301 et seq.; to the interchange of equipment between such common carriers of property by motor vehicle, and to the lease of equipment by common and contract carriers of property by motor vehicle, with or without drivers, to private motor carriers and shippers.

§ 207.2 **Definitions.** (a) **Authorized carrier.** A person or persons authorized to engage in the transportation of property as a common or contract carrier under the provisions of Sections 206, 207, or 209 of the Interstate Commerce Act, 49 U. S. C. 306, 307, or 309.

(b) **Equipment.** A motor vehicle, straight truck, tractor, semitrailer, full trailer, combination tractor-and-semitrailer, combination straight truck and full trailer, and any other type of equipment used by authorized carriers in the transportation of property for hire.

(c) **Interchange of equipment.** The physical exchange of equipment between motor common carriers or the receipt by one such carrier of equipment from another such carrier, in furtherance of a through movement of traffic, at a point or points which such carriers are authorized to serve.

(d) **Regular employee.** A person not merely an agent but regularly in exclusive full-time employment.

(e) **Agent.** A person duly authorized to act for and on behalf of an authorized carrier.

(f) **Owner.** A person (1) to whom title to equipment has been issued, or (2) who as lessee, has the right to exclusive use of the equipment for a period longer than 30 days, or (3) who has lawful possession of equipment and has the same registered and licensed in any State or States or the District of Columbia in his or its name.

(g) **Private carrier.** A person as defined in § 203(a)(17) of the Interstate Commerce Act.

* * *

§ 207.3 **Exemptions.** The provisions of § 207.4, except paragraphs (c) and (d), relative to inspection and identification of equipment, shall not apply:

(a) Equipment used in the direction of a point which lessor is authorized to serve. To equipment owned or held under a lease of 30 days or more by an authorized carrier and regularly used by it in the service authorized, and leased by it to another authorized carrier for transportation in the direction of a point which lessor is authorized to serve: *Provided,* That the two carriers have first agreed in writing that control and responsibility for the operation of the equipment shall be that of the lessee from the time the equipment passes the inspection required to be made by lessee or its representative under § 207.4(c) of these rules until such time as the lessor or its representative shall give to the lessee or its representative a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is retaken or until such time as the required inspection is completed by another authorized carrier taking possession of the equipment in an interchange of equipment where such use is contemplated, such writing to be signed by the parties or their duly authorized regular employees or agents, and a copy thereof carried in the equipment while the equipment is in the possession of the lessee.

(b) Rail or express vehicles. To equipment utilized wholly or in part in the transportation of railway express traffic, or in substituted motor-for-rail transportation of railroad freight between points that are railroad stations on railroad billing.

(c) Commercial zone operations. To equipment utilized in transportation performed solely and exclusively within any municipality, contiguous municipalities, or commercial zone, as defined by the Commission.

(d) Vehicles without drivers from rental companies. To the lease of equipment without drivers by an authorized

carrier from an individual, co-partnership or corporation, whose principal business is the leasing of equipment without drivers for compensation.

(e) Non-powered equipment. To equipment other than a power unit, provided that such equipment is not drawn by a power unit leased from the lessor of such equipment.

* * *

§ 207.4 Augmenting equipment. Other than equipment exchanged between motor common carriers in interchange service as defined in § 207.5 of these rules, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) Contract requirements. The contract, lease, or other arrangement for the use of such equipment—

(1) Parties. Shall be made between the authorized carrier and the owner of the equipment.

(2) Written contract required. Shall be in writing and signed by the parties thereto, or their regular employees or agents duly authorized to act for them in the execution of contracts, leases, or other arrangements.

(3) Minimum duration of 30 days when operated by lessor. Shall specify the period for which it applies, which shall not be less than 30 days when the equipment is to be operated for the authorized carrier by the owner or employee of the owner; excepting:

(i) Equipment used in agricultural or perishable operations. That such 30-day minimum period shall not apply to equipment, with driver, of a farmer, agricultural cooperative or private carrier of certain perishable property or which is exempt under section 203(b)(6) of the act, to the

extent that such equipment falls within the terms of the exceptions of section 204(f)(1) or (2) of the Act (49 U. S. C. 304(f)), and is utilized in accordance therewith; *provided*, that prior to the execution of the lease, the authorized carrier receives and retains a statement signed by the owner of the equipment, or someone duly authorized to sign for the owner, authorizing the driver to lease the equipment for the movement or movements contemplated by the lease, certifying that the equipment so leased meets the qualifications enumerated in section 204(f)(1) or (2) of the Act, and specifying the origin, destination, and the time of the beginning and ending of the last movement which brought the equipment within the purview of section 204(f).

(ii) **Automobile and tank truck carriers.** That equipment owned by an automobile carrier or tank-truck carrier or held by such authorized carriers under lawful leases and used in the transportation of motor vehicles or commodities in bulk, respectively, may be leased or subleased to other such authorized carriers.

* * *

(iii) **Ice and snow control purposes.** That such 30-day minimum period shall not apply to dump equipment leased or subleased for use in transporting salt and calcium chloride, in bulk, for ice and snow control purposes, during the period from November 1 to April 30, both inclusive, of each year.

* * *

(4) **Exclusive possession and responsibility.** Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except:

(i) Lessee may be considered as owner. Provision may be made therein for considering the lessee as the owner for the purpose of subleasing under these rules to other authorized carriers during such duration.

(ii) Household goods carriers—intermittent operations under long-term lease. When entered into by authorized carriers of household goods, for the transportation of household goods, as defined by the Commission, such provisions need only apply during the period the equipment is operated by or for the authorized carrier, lessee.

(5) Compensation to be specified. Shall specify the compensation to be paid by the lessee for the rental of the leased equipment.

(6) Duration to be specific. Shall specify the time and date or the circumstance on which the contract, lease, or other arrangement begins, and the time or the circumstance on which it ends. The duration of the contract, lease or other arrangement shall coincide with the time for the giving of receipts for the equipment, as required by paragraph (b) of this section; and

(7) Copies of lease and their distribution; copy to be carried on vehicle. Shall be executed in triplicate; the original shall be retained by the authorized carrier in whose service the equipment is to be operated, one copy shall be retained by the owner of the equipment, one copy shall be carried on the equipment specified therein during the entire period of the contract, lease, or other arrangement, unless a certificate as provided in paragraph (d) (2) of this section is carried in lieu thereof.

(b) Receipts for equipment to be specific. When possession of the equipment is taken by the authorized carrier or its regular employee or agent duly authorized to act for

it, said carrier, employee or agent shall give to the owner of the equipment or the owner's employee or agent a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is taken; and when the possession by the authorized carrier ends it or its employee or agent shall obtain from the owner of the equipment, or its regular employee or agent duly authorized to act for it, a receipt specifically identifying the equipment and stating therein the date and the time of day possession thereof is taken.

(c) Safety inspection of equipment by the authorized carrier. It shall be the duty of the authorized carrier, before taking possession of equipment to inspect the same or to have the same inspected by a person who is competent and qualified to make such inspection and has been duly authorized by such carrier to make such inspection as a representative of the carrier, in order to insure that the said equipment complies with Parts 193 and 196 of the Motor Carrier Safety Regulations (Rev.), pertaining to "Parts and Accessories Necessary for Safe Operation", and "Inspection and Maintenance", and if explosives or other dangerous articles are to be transported thereon, further to inspect and check such vehicles or equipment to insure that they or it complies with Part 197 of the said safety regulations pertaining to "Safe Transportation of Explosives." The person making the inspection shall certify the results thereof on a report in the form hereinafter set forth, which report shall be retained and preserved by the authorized carrier, and in his inspection discloses that the equipment does not comply with the requirements of the said safety regulations, possession thereof shall not be taken. In all instances in which the inspection required by this rule is made, the authorized carrier, if an individual, or a member of the co-partnership if the authorized carrier

is a co-partnership, or one of the officials thereof if the authorized carrier is a corporation, shall certify on the inspection report that the person who made the inspection, whether an employee or a person other than an employee, is competent and qualified to make such inspection and has been duly authorized by such carrier to make such inspection as a representative of such authorized carrier. When equipment other than a power unit is leased, a form of report applicable to such equipment may be used.

REPORT OF VEHICLE INSPECTION

Description of vehicle:
Make..... Year..... Model..... Serial No.....
Type: Tractor..... Trailer..... Semitrailer.....
License plate: No..... State.....
Owner's name .....
Name of authorized carrier .....

Indicate in the proper column the result of the inspection of each item listed:

Item	*Not Defective*	*Defective*	*Description of Defect*
Body	.....	.....	.....
Brakes	.....	.....	.....
Cooling system	.....	.....	.....
Drive line	.....	.....	.....
Emergency Equipment	.....	.....	.....
Engine	.....	.....	.....
Exhaust	.....	.....	.....
Fuel system	.....	.....	.....
Glass	.....	.....	.....
Horn	.....	.....	.....
Leaks	.....	.....	.....
Lights (state which) .	.....	.....	.....
Reflectors	.....	.....	.....

Item	*Not Defective*	*Defective*	*Description of Defect*
Speedometer			
Springs			
Steering			
Tires			
Wheels			
Windshield wiper			

Any other items requiring attention: .....

.....

I hereby certify that on the ..... day of ..... I carefully inspected the equipment described above and that this is a true and correct report of the result of such inspection.

.....

(Signature of person making inspection)

I hereby certify that on the date stated above the person who made the inspection covered by this report was competent and qualified to make such inspection and was duly authorized to make such inspection as a representative of

.....

(Name of authorized carrier)

Date .....

(Signature of authorized carrier or copartner or officer of authorized carrier.)

(d) Identification of equipment as that of the authorized carrier. The authorized carrier acquiring the use of equipment under this rule shall properly and correctly identify such carrier, during the period of the lease, contract, or other arrangement in accordance with the Commission's requirements in Ex Parte No. MC-41; Part 166, Identification of Motor-Carrier Vehicles. If a removable device is

used to identify the authorized carrier as the operating carrier, such device shall be on durable material such as wood, plastic, or metal, and bear a serial number in the authorized carrier's own series so as to keep proper record of each of the identification devices in use.

(1) Identification to be removed when lease terminated. The authorized carrier operating equipment under these rules shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possession of the equipment.

(2) Certified statement may be carried on vehicle in lieu of lease. Unless a copy of the lease, contract, or other arrangement is carried on the equipment, as provided in paragraph (a) (7) of this section, the authorized carrier or its regular employee or agent shall prepare a statement certifying that the equipment is being operated by it, which shall specify the name of the owner, the date of the lease, contract, or other arrangement, the period thereof, any restrictions therein relative to the commodities to be transported, and the location of the premises where the original of the lease, contract or other arrangement is kept by the authorized carrier, which certificate shall be carried with the equipment at all times during the entire period of the lease, contract or other arrangement.

(e) Driver of equipment to be in compliance with safety regulations. Before any person other than a regular employee of the authorized carrier is assigned to drive equipment operated under these rules, it shall be the duty of the authorized carrier to make certain that such driver is familiar with and that his employment as a driver will not result in violation of any provision of Parts 192, 193, 195, and 196 of the Motor Carrier Safety Regulations (Rev.) pertaining to "Driving of Motor Vehicles", "Parts and Acces-

sories Necessary for Safe Operation", "Hours of Service of Drivers", and "Inspection and Maintenance", and to require such driver to furnish a certificate of physical examination in accordance with Part 191 of the Motor Carrier Safety Regulations (Rev.) pertaining to "Qualifications of Drivers", or, in lieu thereof, a photostatic copy of the original certificate of physical examination, which shall be retained in the authorized carrier's file.

(f) Record of equipment to be maintained; shipping documents to identify the authorized carrier. The authorized carrier utilizing equipment operated under these rules for periods of less than 30 days shall prepare and keep a manifest or other documents covering each trip for which the equipment is used in its service, containing the name and address of the owner of such equipment; point of origin, the time and date of departure, the point of final destination, and the authorized carrier's serial number of any identification device affixed to the equipment. During the time that equipment subject to these rules is operated there shall be carried with the equipment, bills of lading, waybills, freight bills, manifests, or other papers identifying the lading, and containing the foregoing information, which shall clearly indicate that the transportation of the property carried is under the responsibility of the authorized carrier, which papers shall be preserved by the authorized carrier. This rule shall also apply with respect to vehicles leased for periods of 30 days or more unless the required information is kept at a terminal or office as a part of the records of the authorized carrier.

§ 207.5 Interchange of equipment. * * *

* * *

(e) Identification of equipment as that of the operating carrier. Authorized carriers operating power units in interchange service shall identify such equipment in accordance

with the Commission's requirements in Ex Parte No. MC 41, Part 166, Identification of Motor Carrier Vehicles. Any removable device used to identify the operating carrier shall be on durable materials such as wood, plastic, or metal, and shall bear a serial number in the operating carrier's own series and such carrier shall keep a proper record of each identification device in use. The authorized carrier operating equipment under these rules shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possession of the equipment. Authorized carriers operating equipment in interchange service under this section shall carry with each vehicle so operated, except trailers and semitrailers, a copy of the contract, or other arrangement, while the equipment is being operated in the interchange service, unless a statement certifying that the equipment is being operated by it and identifying the equipment by company or State registration number, showing the specific point of interchange, the date and time of the assumption of responsibility for the equipment, and the use to be made of the equipment, is carried in the vehicle while it is operated in interchange service. Such statement shall be signed by the parties to the contract or other arrangement or their employees or agent.

(f) Through movement involving more than two carriers. For the purpose of this rule, a lessee of equipment on a through movement involving more than two carriers, shall be considered the owner of the equipment for the purpose of leasing the equipment for movement to destination or for return to the originating carrier.

§ 207.6 Rental of equipment to private carriers and shippers. (a) Rental of equipment with drivers. Unless such service is specified in their operating authorities, authorized carriers shall not rent equipment with drivers to

private carriers or shippers, except where the vehicle so rented is to be used for transportation which may be performed for compensation within the exemption provisions of § 203(b)(7) or (8) of the Interstate Commerce Act.

(b) Rental of equipment without drivers. Authorized common carriers shall not rent equipment without drivers to private carriers or shippers and authorized contract carriers shall not so rent such equipment without first having obtained approval of the rental contract from this Commission, *except* that the prohibitions contained in this rule shall not apply to authorized carriers transporting property wholly for and on the billing of railroads or where the vehicle so rented is to be used for transportation which may be performed for compensation within the exemption provisions of § 203(b)(7) or (8) of the Interstate Commerce Act.

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No. 1262

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

ARTHUR WILCOX, LESLIE GRIER, GEORGE PORTER, ABE SMITH, RUSSELL WATERS and OTIS DRUMMOND,
Petitioners,

v.

TRANSAMERICAN FREIGHT LINES, INC.,
Respondent.

BRIEF OF RESPONDENT

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In The

Supreme Court of the United States

October Term, 1966

No. 1262

ARTHUR WILCOX, LESLIE GRIER, GEORGE PORTER, ABE SMITH, RUSSELL WATERS and OTIS DRUMMOND,
Petitioners,

v.

TRANSAMERICAN FREIGHT LINES, INC.,
Respondent.

BRIEF OF RESPONDENT

QUESTION PRESENTED

Is this case one in which a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above entitled cause?

STATEMENT OF THE CASE

This matter was the subject of a Motion for Summary Judgment which was granted by the District Court pursuant to Rule 56, Federal Rules of Civil Procedure. The factual premises upon which the District Court and the Court of Appeals acted are set forth in the opinions of those Courts. The record in this case is extensive and includes a voluminous deposition of the co-defendant, Harry Culyer, as well as numerous affidavits and records, all of which are not before this Court. In determining that the Respondent was entitled to a judgment as a matter of law,

because there was no genuine issue as to any material fact, it is clear from their opinions that both the District Court and the Court of Appeals considered the record carefully. It appears inappropriate at this time to burden this Court with selected excerpts taken out of context from the record. Since, however, the Petitioners have itemized certain facts in their Petition, it may be necessary for the purposes of this brief and in order to support the authority to be cited to present some facts in addition to those set forth in the opinions of the lower courts. These facts are:

1. Culyer occupied a dual relationship with Respondent, being both a lessor of equipment and also a driver of equipment.
2. Compensation for lease of the equipment was computed and paid separately and apart from any compensation paid as an employee.
3. Culyer was only paid as an employee when he was dispatched by or under instructions from Respondent and when the movement of his unit was on Respondent's business.
4. All costs and expenses related to the operation of the equipment leased by Culyer were his responsibility as lessor and this responsibility included the obligation to "at all times keep . . . equipment in good mechanical condition, order and repair." Culyer's uniform was purchased and decorated by him and "Transamerican had nothing to do with the uniform."
5. Culyer maintained a log indicating his time "on duty" and his time "off duty", the status of "off duty" occurring when he was outside of the direction and supervision of Respondent.
6. At the time of the accident, Culyer was carrying himself as "off duty."

7. Culyer was responsible for getting himself to work getting himself home from work.
8. Culyer provided the basic license for the unit leased to Respondent.
9. Culyer, on the date of the accident, was not instructed to take his equipment home, did not ask anyone to take his equipment home, was not directed to go to the Cincinnati Terminal, was not required to keep his automobile at the Cincinnati Terminal, and he could travel any road he wanted on the way to Cincinnati.
10. The trip involved was not in interstate commerce.

ARGUMENT

The first contention made by Petitioners is that they were deprived of a trial by jury. To the contrary, the cases have held that, since Rule 56 may properly be invoked only where there is no fact issue to be tried, the use of the Rule does not violate the constitutional guaranty of trial by jury of fact issues. *Lindsey* v. *Leavy,* 149 F.2d 899 (9 Cir. 1945), Cert. den. 66 S. Ct. 331, 326 U.S. 783, 90 L. Ed. 474; *Page* v. *Work,* 290 F.2d 323, 334 (9 Cir. 1961), Cert. den. 82 S. Ct. 121, 368 U.S. 875, 7 L. Ed. 2d 76.

With respect to the balance of the Petition which is addressed to the so-called subsidiary questions, there is one basic legal principle which supports the decisions of the lower courts in this case. This principle has been accepted and reiterated in almost every decision, federal and state, touching upon the subject of this controversy. In considering similar factual situations involving the claim that the lessee-motor carrier was vicariously responsible for the acts of its lessor-driver, the principle established by the decisions is:

It is the actual relationship between the operator of the equipment and the lessee thereof at the time of the accident which determines the responsibility or lack thereof of the lessee-motor carrier for the negligence of the operator.

The above proposition results from the Ohio case of *Simon* v. *McCullough Transfer Co.,* 155 O.S. 104, 98 N.E. 2d 19 (1951), a "trip lease" case. If the "trip lease" factor was distinguishing, that stigma was removed when Justice Stewart, while sitting on the Sixth Circuit, wrote the opinion in the case of *Kaplan Trucking Company* v. *Lavine,* 253 F. (2) 254 (6 Cir. 1958), a situation arising under the same regulations applicable in this case. In the *Kaplan* case Judge Stewart stated:

> "It is the actual relationship of the parties at the time of the collision that is controlling." (ibid 257)

The necessity that there be some positive relationship between the lessee-driver and the lessor-carrier is also emphasized in the Ohio decision of *Thornberry* v. *Oyler,* 164 O.S. 395, 131 N.E.2d 383 (1955) wherein, in its first syllabus the Court stated that the carrier was only responsible "for the actions and conduct of the driver within the scope of the carrier's business." (131 N.E.2d 383)

The I.C.C. regulations themselves give clear indication of the circumstances under which they are applicable to any arrangement created thereunder. In Sec. 207.2 (b) of the Regulations the word "Equipment" is limited, by definition, to vehicles "used by authorized carriers *in the transportation of property for hire.*" (App. C. 11a). (emphasis supplied.) Thereafter, the regulations specifying the conditions upon which the Petitioners rely, apply said conditions only to "authorized transportation in or with equipment." (ibid 13a) In this case, there was no

transportation of property for hire, nor was there any transportation in or with equipment and no facts suggesting either to justify the invocation of the regulations, even if they mean what Petitioners contend they mean. Therefore, on the basis of the regulations themselves, Petitioners' arguments should fail.

The most recent and analagous case on the subject of carrier responsibility for acts of an off duty lessor is *Gackstetter* v. *Dart Transfer Co.*, 130 N.W.2d 326 (Minn. 1964). The hypothesis urged by the litigant attempting to hold the carrier in that case is the same as is forwarded in this Petition, and was stated by the Minnesota Court to be "an assertion that the effect of these regulations and the lease is to impose for the period of the lease an absolute liability" upon the carrier for the negligence of the lessor. (ibid 329, 330). In answering that hypothesis, the Court stated that: "The effect of the rules and the lease is to make the owner-driver an employee of the lessee." (ibid 329) In support of this conclusion the Court cited not only the *Kaplan Trucking Company* and *Simon* v. *McCullough Transfer Co.* cases cited heretofore, but also the cases upon which Petitioners rely on page 12 of the Petition.

The trial court, in this case, in reaching his decision cited exactly the same cases and, in addition, included the *Gackstetter* decision in restating the principle that the authorities "unequivocally establish that liability has not been imposed on an absolute basis, but rather has been based on whether, at the time of the accident, the owner-operator-lessor was in the scope of his employment for his carrier's business." (App. A, 5A). This determination is, of course, consistent both with the cases cited and the regulations and requires the conclusion that whatever else a lease arrangement between an owner-lessor and a lessee-carrier may imply, it does not create a relationship whereby

every use of the leased vehicle or every activity of the lessor-driver is or becomes the use or the activity of the lessee.

Perhaps most of the cases cited in the Petition resulted in findings similar to those for which these Petitioners originally had aspirations. In each of these cases, however, there were genuine factual issues which had to be developed and determined by a jury. An example is the situation in the *Kaplan Trucking Company* case, where the Court indicated clearly that there was a factual issue whether or not the lessor-driver was on the business of the carrier at the time of the accident. Both of the lower courts in this case, however, applying the standards and criteria required in the face of a Motion for Summary Judgment, found there was no factual issue. In so doing, the Court did not decide any facts but merely applied the facts in the record to the law which looks to the actual relationship of the parties at the time of the collision.

No specific argument in support of the statement that there is a conflict between decisions of the Third Circuit and the Sixth Circuit is made in the Petition, although such a conflict is designated as a reason for granting the Writ of Certiorari. Comparison of the case of *Mellon National Bank & Trust Co.* v. *Sophie Lines, Inc.*, 289 F. (2) 473 (3 Cir. 1961) with this case will show clearly the consistency and compatability between the two cases. In the *Mellon* decision, an actual interstate movement requiring a franchise was being conducted under the ostensible authority of the carrier in a unit then under lease to it by a driver employed by it. In addition, the Court found a definite benefit to the carrier in conserving certain expenses it would have otherwise had. None of these facts exist in this case. To the contrary, the movement by Culyer was not in interstate commerce, was not upon the business of the Respondent, but was for Culyer's own

personal benefit and in the interest of his business operation as a lessor of motor equipment. As a result reasonable minds could not reasonably differ concerning the absence of responsibility of the Respondent for Culyer's activity.

While neither of the lower courts touched upon the admittedly intrastate character of the particular movement in this case, of interest on this subject is the case of *Schmidbauer* v. *Baltimore & Pittsburgh Motor Express Co.*, 181 A.2d 325 (Md. 1962). In that case the Court, referring to ICC regulations, held that:

> ". . . Section 207.4 does not impose liability on the franchise carrier between interstate movements, when the non-owned equipment is being utilized in an activity that is entirely disassociated with interstate or foreign commerce, such as the activity of the tractor involved in the present case as shown by the undisputed facts." (ibid 330)

Further, the decision stated:

> "The fact that appellee's name and ICC permit number were displayed on the tractor and the fact that a copy of the lease was in the cab, are immaterial to the case at bar. None of these was needed . . . to carry on the movement in which the operator was engaged when the collision occurred." (ibid 330)

In this case, no authority conferred on Respondent was required to permit the movement of Culyer in a truck owned by him, both literally and as hereafter developed by specific ICC definition, on a license provided to him on a route chosen by him. It is submitted that on the rationale of the *Schmidbauer* case alone, the decision of the lower courts in this case is proper.

In criticizing the decision made by the Court of Appeals, Petitioners have derided the Court's comment concerning the concept of ownership, its responsibilities and

privileges. This criticism, however, again ignores the specific provisions of the ICC regulations which, in Sec. 207.2 (f), (1) and (3) thereunder, make Culyer an "owner" and, simultaneously, in (2) thereof also conceives ownership in the Respondent. (App. C, 11a). The Ohio law, of course, is clear and unequivocal that the assessment of responsibility to an owner of a motor vehicle must be governed by the principle of respondent superior. *White Oak Coal Co.* v. *Rivoux*, 88 O.S. 18 (1913); *Senn* v. *Lackner*, 157 O.S. 206, 105 N.E.2d 49 (1952).

The public policy argument made by Petitioners in reliance on *Hodges* v. *Johnson*, 52 F. Supp. 488 (D.C. W. Va. 1943) has already been answered by the Ohio Supreme Court. In the *Simon* v. *McCullough Transfer* (*supra*) opinion, Judge Stewart stated pointedly in referring to the view in the *Hodges* case: "With due respect we are constrained to disagree." (98 N.E.2d 24):

The arguments and authorities set forth in the Petition develop neither a great question of public importance, nor do they demonstrate a real conflict between the decisions of Circuit Courts, nor do they establish any of the reasons, either literal or within the sense of Supreme Court Rule 19 to justify the grant of a Writ of Certiorari. The only real question which was involved in the original proceeding from which this Petition has come was whether, on the facts presented, there was any genuine issue. Both of the lower courts analyzed the facts carefully and the Petitioners had a generous opportunity to present evidence and to set forth in brief and on oral argument where and to what extent there was an issue of fact. In essence, Petitioners are now coming before this Court to request it to review the evidence which revealed without question as the Court of Appeals said: "In driving his tractor on the way home after completion of his work and while off duty, he (Culyer) was not engaged in his employer's business, nor was he

doing anything for the benefit of his employer." (App. B., 9a). Justice Holmes has stated: "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Jonston*, 268 U.S. 220, 227 (1924). To the same effect is *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 82 L. Ed. 1273, 58 S. Ct. 849 (1937).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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By .....

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